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APPENDIX

SUPREME COURT
OF

THE UNITED STATES

CENTRAL MACHINE & TOOL COMPANY, INC.

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NO. 938

Appendix I -- Decision of Trial Examiner of the NLRB in Case 16-CA-3053, dated May 23, 1968.

(Explanation: Asterisks (***) represent deleted language not pertinent to issue).

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

CENTRAL MACHINE & TOOL CO., INC.

and

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL--CIO

Norman W. Schlenker, Esq. for the General Counsel.
Frank Carter and Bryce Hodgden, Esqs., of Enid, Oklahoma, for Respondent.
Mr. V. M. Cameron and Fleas Fagan, Es., of Ft. Worth, Tex., and Washington, D.C., respectively, for the Charging Party.

CASE 16-CA-3883

TRIAL EXAMINER'S DECISION

I Statement of the Case

THOMAS S. WILSON, Trial Examiner: Upon charges duly filed on July 12 and August 9, 1967, by International Association of Machinists and Aerospace Workers, AFL--CIO, hereinafter referred to as the Union or Charging Party, the General Counsel of the National Labor Relations

Board, hereinafter referred to as the General Counsel 1/ and the Board respectively, by the Regional Director for Region 16, Ft. Worth, Texas, issued its amended complaint dated December 8, 1967, against Central Machine & Tool Company, Inc., hereinafter referred to as the Respondent. This complaint alleged that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Labor Management Relations Act, 1947, as amended, herein referred to as the Act.

Respondent duly filed its answer admitting certain allegations of the complaint but denying the commission of any unfair labor practices.

Pursuant to notice a hearing thereon was held in Enid, Oklahoma, from January 15 to January 20, 1968, inclusive, before me. All parties appeared at the hearing, were represented by counsel, and were afforded full opportunity to be heard, to produce, to examine and cross-examine witnesses, and to introduce evidence material and pertinent to the issues. At the conclusion of the hearing, oral argument was waived. Briefs were received from General Counsel and Respondent on March 7, 1968.

1/ This term specifically includes the attorney appearing for the General Counsel at the hearing.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. The Business of Respondent

The complaint alleged, the answer admitted, and I therefore find:

Central Machine & Tool Company, Inc., is, and has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of the State of Oklahoma, having its principal office and place of business at 3005 N. Enid Boulevard in the City of Enid, Oklahoma, herein called its plant, where it is engaged in the manufacture of tools and couplings.

During the past 12 months, which period is representative of all times material herein, Respondent, in the course and conduct of its business operations, purchased, transferred, and delivered to its plant goods and materials valued in excess of $50,000.00, which were transported to said plant directly from States of the United States other than the State of Oklahoma.

Accordingly, I find that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

International Association of Machinists and Aerospace Workers, AFL--CIO, is a labor organization admitting to membership employees of Respondent.

III. The Unfair Labor Practices

A. The Refusal to Bargain

1. The appropriate unit

The complaint alleged, the answer admitted and I find that:

All production and maintenance employees, including truckdrivers and regular part-time employees, but excluding office clerical employees, professional and technical employees, guards, watchmen, and supervisors as defined in the Act, as amended, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. The majority and certification

The complaint alleged, Respondent at the hearing admitted, and I find that:

On March 15, 1967, a majority of the employees of Respondent in the unit described above, by secret-ballot election conducted under the supervision of the Regional Director of Region 16 of the National Labor Relations Board, designated and selected the Union as their representative

for the purposes of collective bargaining with Respondent. The Union was certified as such representative on May 3, 1967.

3. The refusal to bargain

The complaint herein alleged that Respondent refused to bargain by: (1) Negotiating throughout in bad faith; *** (6) conditioning the Union's right to call a strike as the last step in the grievance procedure upon "the issue must be fairly presented to the membership of the bargaining unit after due notice, and more than 50 percent of the members of the bargaining unit authorized to strike." 2/

In the light of the ultimate developments which occurred in part during the instant hearing, it seems a waste of time now to detail at any length the proposals, counterproposals, arguments, and counterarguments made in each of the 14 actual negotiation meetings held between May 31, 1967, and January 17, 1968, as was done during the presentation of the testimony here.

2/ This ground was not alleged in the complaint but was fully litigated at the hearing with a concurrence of Respondent's attorney.

Suffice it to say here that, in general, all major issues between the parties on the terms of the contract from the commencement of negotiations on May 31, 1967, to January 16, 1968, remained unresolved due, in large measure, to Respondent's insistence throughout that "all decisions are to be made by management." Then, during the instant hearing, a letter dated January 16, 1968, from Respondent to the Union suddenly resolved all issues but the ballot issue satisfactorily to both parties. This sole remaining issue will be discussed hereinafter. 3/

******

*** Early in the negotiations the grievance procedure proposed by the Union was acceptable to the Respondent up to the final step which was arbitration. Carter for Respondent stated that Parrish would never agree to arbitration as he did not want any third person telling him how to run his company. Carter did agree that, in lieu of arbitration, the Union would have the right to strike if it were still dissatisfied after conferring with Parrish as Respondent's proposed final step of the grievance procedure. However, during the October 5, meeting, Carter conditioned the Union's

3/ Although this ballot issue arose originally at the session held on October 5, 1967, the issue was not pleaded in the complaint. However, when General Counsel offered Respondent's January 16 letter and the Union's January 17 answer in evidence, Respondent's attorney stated on the record that, if the General Counsel had not offered the documents, he would have. Thus the issue was fully litigated at the hearing.

right to strike at the end of the agreed-upon grievance procedure upon a requirement that the Union could strike only after a majority of all employees in the bargaining unit, whether union or non-union, voted affirmatively to strike. This condition the Union flatly refused to agree to. The Union was adamant then and is still adamant against this condition.

Although the parties reached many agreements during this October 5 meeting, this proved to be the next to last meeting between the parties. The last meeting was held on November 21 in the absence of Carter. Several more agreements were reached. But Respondent still insisted that all unit employees had to vote strike authorization before the Union would be permitted to strike. The union still refused to accept this requirement. In addition the Union was at the time objecting to the management-rights clause which Respondent had proposed. These two items were by this time the major points of disagreement between the parties. After November 21, there was considerable correspondence between the parties but no further face-to-face negotiations until the morning before the instant hearing opened when their parties again talked face to face which resulted in the Respondent's letter dated January 16, 1968.

This counterproposal submitted by Carter in the January 16 letter contained the following:

(w) Article XXIV -- Grievance Procedure -- This will be in accordance with the Article XXIV of the Company's counterproposal outlining the grievance procedure except the addition of paragraph 3. The first paragraph of the procedure provides for the submission of a grievance to the shop or union steward. The second step provides for adjustment by the shop foreman or a supervisor. The third step provides for submission of a grievance if not settled, to the Plant Manager or the President of the Company. The fourth step will constitute the remedy of the Union, in that it may call a strike, providing that the issue is fairly presented to the membership of the bargaining unit after due notice, and more than 50% of the members of the bargaining unit authorized (sic) to strike. It is assumed and hoped by the Company that it will never be necessary to resort to the remedy as provided therein; but it is available in the event the Union should desire to utilize it.

*****

*** (dd) Article XXX -- Strikes -- In consideration of the fact that you have agreed to our management clause, and we in turn, have agreed to eliminate the lockout clause, the Company would further agree that in the event any grievance is not settled on the last step of the Grievance Procedure, the Union will have the right to strike, provided, of course, that the issue is fairly presented to the personnel of the Production and Maintenance Department which represents your bargaining unit,

and that on proper notice of such hearing, you secure a majority vote of all of the members in the bargaining unit which you represent.

By hand-written letter dated the following day, January 17, the Union, after pointing out that by telephone Respondent had agreed to reinstate the quarterly bonus payments (mentioned above), accepted Respondent's counterproposal contained in its January 16 letter with the sole exception of the above-quoted articles which the Union continued to maintain were illegal. Thus through negotiations continuing through the period of the instant hearing, the parties reached agreement on every article of a complete contract except for the issue presented by the paragraphs from Respondent's January 16 counterproposal quoted above. Thus the condition precedent to the Union's right to strike as quoted above is the only thing preventing a complete agreement between the parties.

There can be no question but that the condition precedent to striking insisted upon by Respondent is illegal and that Respondent's insistence thereupon to impasse constitutes a refusal to bargain in violation of Section 8(a)(5) of the Act. The Supreme Court so held in NLRB v. Wooster Division of Borg-Warner Corporation, 356 U.S. 342, 349, 350, where the Court in sustaining the Board's 8(a)(5) finding said:

"Since it is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without, the issue here is whether either the "ballot" or the "recognition" clause is a subject within the phrase "wages, hours, and other terms and conditions of employment" which defines mandatory bargaining. The "ballot" clause is not within that definition. It relates only to the procedure to be followed by the employees among themselves before their representative may call a strike or refuse a final offer. 4/ It settles no term or condition of employment --- it merely calls for an advisory vote of the employees. It is not a partial "no-strike" clause. A "no-strike" clause prohibits the employees from striking during the life of the contract. It regulates the relations between the employer and the employees. See NLRB v. American Co., supra, at 408, n. 22. The "ballot" clause, on the other hand, deals only with relations between the employees and their unions. It substantially modifies the collective-bargaining system provided for in the statute by weakening the independence of the "representative" chosen by the employees. It enables the employer, in

4/ The "ballot" clause in the quoted case is substantially the same as Respondent proposed in the instant case.

effect, to deal with its employer rather than with their statutory representative. Cf. Medo Photo Corp. vs. NLRB, 321 U.S. 678."

Accordingly, I must, and hereby do, find that by insisting upon such illegal condition as the "ballot" clause to impasse Respondent refused to bargain in violation of Section 8(a)(5) of the Act. In addition, I would also hold that from May 31, 1967, to January 16, 1968, Respondent failed to bargain in good faith with the Union as the representative of the employees in the appropriate unit.

****

***IV. The Effect of Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

It having been found that Respondent has engaged in certain unfair labor practices, it will be recommended that Respondent cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

****

***Having found that Respondent has refused to bargain in good faith with the Union as the certified bargaining agent for all of Respondent's production and maintenance employees in the appropriate unit and that Respondent particularly so refused to bargain on January 16, 1968, by its insistence upon the inclusion in such contract of a certain illegal requirement as found heretofore when, in all other respects, the parties had otherwise reached agreement as shown by the Union's letter of January 17, 1968. In the light of these facts and in order to restore the status quo, I will recommend that, upon request, Respondent bargain in good faith with the Union as the certified representative of Respondent production and maintenance employees in the appropriate unit, or at the Union's option, that Respondent execute the agreement offered by Respondent in its letter of January 17, 1968, with the exception of the illegal condition attached thereto by Respondent and found above.

Because of the variety of the unfair labor practices engaged in by the Respondent, I sense an opposition by Respondent to the policies of the Act in general, and hence I deem it necessary to order Respondent to cease and desist from in any manner infringing upon the rights guaranteed its employees in Section 7 of the Act.

CONCLUSIONS OF LAW

1. International Association of Machinists and Aerospace Workers, AFL--Cio, is a labor organization admitting to membership employees of Respondent.

****

***3. All production and maintenance employees, including truckdrivers and regular part-time employees, but excluding office clerical employees, professional and technical employees, guards, watchmen and supervisors, as defined in the Act, as amended, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. On May 3, 1967, and at all times thereafter, the Union has been, and now is, the representative for the purposes of collective bargaining of all of Respondent's employees in the above-described appropriate unit, and, by virtue of Section 9(a) of the Act, has been and now is the exclusive representative of all employees in such appropriate unit for the purposes of collective bargaining with Respondent in respect to rates of pay, wages, hours of employment, and other conditions of employment.

5. By refusing from on and after May 31, 1967, and particularly on January 16, 1968, and at all times thereafter, to bargain in good

faith with the Union as such exclusive representative of its employees, Respondent has refused to bargain with such certified union as such representative in good faith in violation of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, I hereby issue the following:

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, I recommend that Central Machine & Tool Company, Inc., Enid, Oklahoma, its officers, agents successors, and assigns, shall:

1. Cease and desist from:

******

***(b) Refusing to bargain in good faith with International Association of Machinists and Aerospace Workers, AFL--CIO, as the certified representative of all Respondent's production and maintenance employees in the appropriate unit consisting of all production and maintenance employees, including truckdrivers and regular part-time employees, but excluding office clerical employees, professional and technical employees. guards, watchmen and supervisors as defined in the Act.

(c) In any like or related manner interferring with the employees' right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in any other union or concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain therefrom except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in the proviso of Section 8(a)(3) of the Act, as amended.

2. Take the following affirmative action designed to effectuate the policies of the Act:

****

***(b) Upon request, bargain in good faith with International Association of Machinists and Aerospace Workers, AFL--CIO, as the certified bargaining representative of all those employees of Respondent in the appropriate unit found above or, at the Union's option, execute the agreement offered by Respondent to said Union by letter dated January 16, 1968, as altered and accepted by the Union's letter of January 17, 1968, omitting the illegal condition found above herein.

****

***(d) Post at its plant in Enid, Oklahoma, copies of the attached notice marked "appendix". 7/ Copies of said notice, on forms provided by the Regional Director for Region 16, shall be posted by Respondent, after being duly signed by its representative, immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the said Regional Director, in writing, within 20 days from the date of the receipt of this Decision, what steps Respondent has taken to comply herewith. 8/

7/ In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order, shall be substituted for the words "a Decision and Order".

8/ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 16, in writing, within 10 days from date of this order, what steps Respondent has taken to comply herewith".

IT IS FURTHER RECOMMENDED that, unless Respondent notifies said Regional Director within 20 days from the receipt hereof, that it will take the action here recommended, that the Board issue an order directing Respondent to take the action here recommended.

Dated at Washington, D.C.
May 23, 1968.

"Certified True Copy
O.W. Fields
Executive Secretary, NLRB
Date: May 23, 1968."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

****

***WE WILL bargain in good faith with International Association of Machinists and Aerospace Workers, AFL--CIO, as the certified reprentative of our production and maintenance employees in the appropriate unit or, at the Union's option, we will execute an agreement containing all those terms and conditions offered in our letter to the Union dated January 16, 1968, as accepted and amended by the Union's letter dated January 17, 1968, but deleting the illegal condition of prestrike balloting by unit employees.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of the aforesaid Union or of any other labor organization, except to the extent that this right may be affected by an agreement executed in convirmation with Section 8(a)(3) of the Act, as amended.

CENTRAL MACHINE & TOOL
COMPANY, INC.
Employer

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 8A24, Federal Office Building, 819 Taylor Street, Fort Worth, Texas 76102, Telephone 334-2921.

APPENDIX

SUPREME COURT
OF
THE UNITED STATES

CENTRAL MACHINE & TOOL COMPANY, INC.

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NO. 938

APPENDIX II -- Decision and Order of the NLRB.

DECISION AND ORDER

On May 23, 1968, Trial Examiner Thomas S. Wilson, issued his Decision in the above-entitled case, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing, and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, 1/ and recommendations 2/ of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Central Machine & Tool Company, Inc., Enid, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., August 19, 1968.

John H. Fanning, Member

Howard Jenkins, Jr., Member

Sam Zagoria, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

SUPREME COURT
OF

THE UNITED STATES

CENTRAL MACHINE & TOOL COMPANY, INC.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NO. 938

Appendix III -- Opinion of the United States Court of Appeals, dated July 15, 1970, substantially affirming.

UNITED STATES COURT OF
APPEALS
TENTH CIRCUIT

MAY, 1970, TERM

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
vs.	)	NO. 543-69
CENTRAL MACHINE & TOOL COMPANY, INC., Respondent.	)	

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

John I. Taylor, Attorney NLRB, Washington, D.C. (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Ronald Greenberg, Attorney NLRB, Washington, D.C., on the brief) for Petitioner;

Frank Carter, Enid, Oklahoma, (Stephen Jones, Enid, Oklahoma, on the brief) for Respondent.

Before PHILLIPS, BREITENSTEIN and HILL, United States Circuit Judges.

HILL, Circuit Judge.

The National Labor Relations Board is before this Court seeking enforcement of its decision and order of August 19, 1968, against Central Machine & Tool Company, Inc. The Company was found to have engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) and section 8(a)(5) of the Act and to have failed to bargain in good faith as defined in section 8(d). With only slight modification, the findings and conclusions of the trial examiner were adopted by the Board and, pursuant to section 10(c) of the Act, it ordered the enforcement of the examiner's recommended order. The alleged unfair labor practices occurred in Enid, Oklahoma. We have jurisdiction to enforce the order under 29 U.S.C. §160(e).

It is undisputed that a local of the International Association of Machinists and Aerospace Workers was elected and certified on May 3, 1967, as the collective bargaining representative of a unit comprising all production and maintenance employees, including truck drivers and regular part-time employees at Central Machine & Tool Company. The complaint alleged, and the trial examiner found, that the Company refused to bargain by (1) negotiating throughout in bad faith; (2) dilatorily failing and refusing to meet at reasonable times; (3) unilaterally granting wage increases to unit employees on or about May 28, 1967, and again on January 12, 1968, while purporting to negotiate wages with the Union; (4) unilaterally withdrawing a quarterly bonus to unit employees on July 16, 1967; (5) refusing the Union's request for information regarding the unilateral wage increases; and

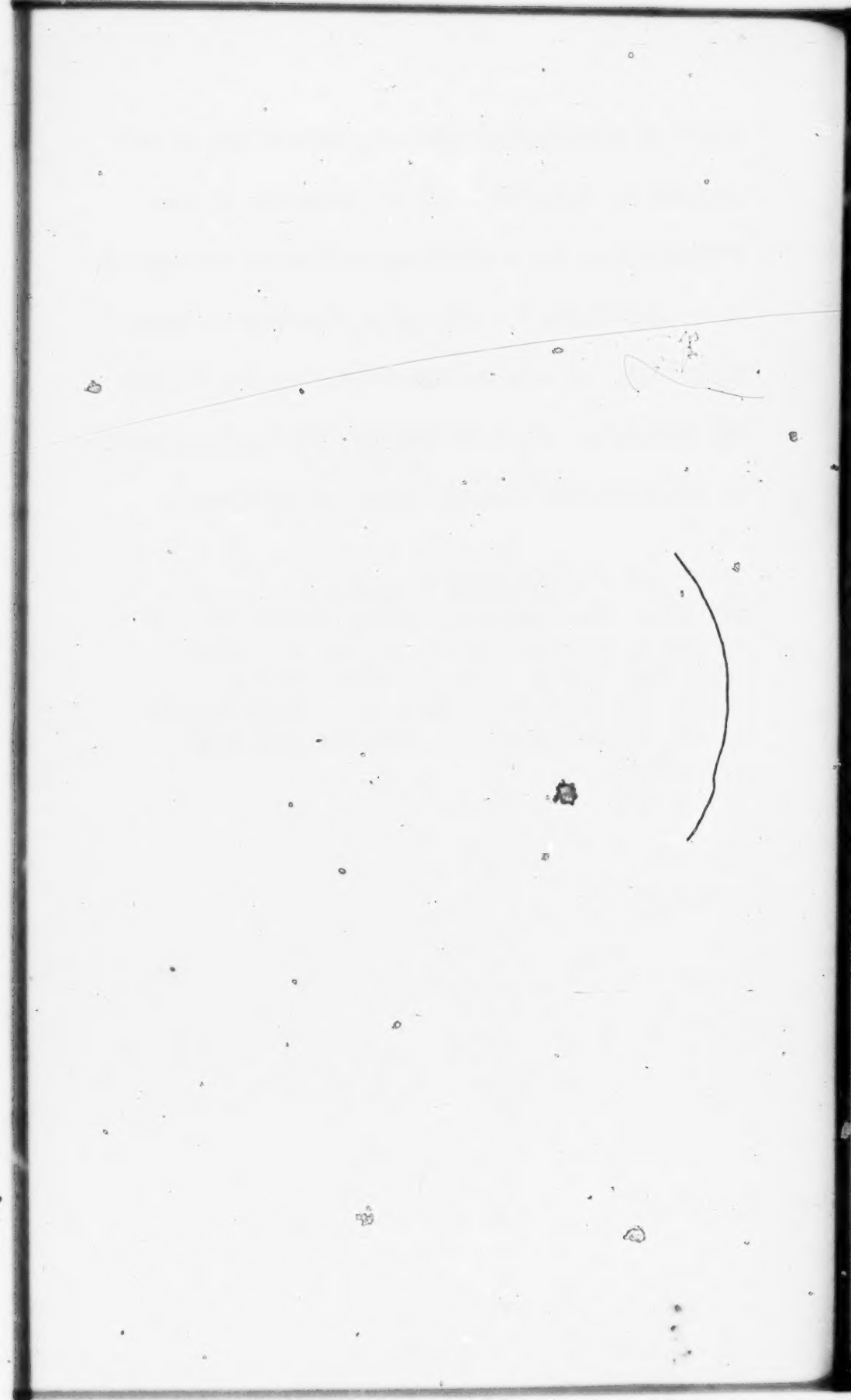
(6) conditioning the Union's right to call a strike on the last step in the grievance procedure upon "the issue (being) fairly presented to the membership of the bargaining unit after due notice, and more than 50 per cent of the members of the Bargaining Unit authorizes (sic) the strike".

The trial examiner also found that the Company constructively discharged a pro-union employee by "starving him out", that is, by deliberately failing to provide him with work because of his known pro-union activities and sympathies.

As the parties recognize, the question is one of substantial evidence. Our review is limited to searching the record to see if there is substantial evidence to support the fact findings. 29 U.S.C. § 160(e). We do not sit as a super trial examiner, and do not weigh the credi-

bility of one witness against another nor do we search for contradictory inferences. 1/ Notwithstanding the conflicting testimony throughout this record and the divergent opinions connected therewith, we are satisfied that, on the whole, the record is ample to support the findings made by the examiner and accepted by the Board.

1/ NLRB v. Thompson Transport Co., Inc., 421 F2d, 154 (10th Cir. 1970); Pacific Intermountain Express Co. v. NLRB, 412 F2d 1 (10th Cir. 1969); Cain's Coffee Co. vs. NLRB, 404 F2d 1172 (10th Cir. 1968); NLRB vs. St. Clair Lime Co., 315 F2d 224 (10th Cir. 1963).



The Company has questioned the propriety of the finding which states that they have violated section 8(a)(5) of the Act by insisting on the "ballot" clause. The trial examiner premised his finding of a section 8(a)(5) violation upon NLRB v. Wooster Division of Borg-Warner Corporation, 356 U.S. 342 (1958). One of the questions in that case was whether a "ballot" clause, similar to the one proposed here, was within the scope of mandatory bargaining. The Court answered in the negative, holding that insisting on its inclusion to the point of impasse was an unfair labor practice since it was tantamount to a refusal to bargain on "mandatory" subjects.

Basically, the Company now argues that Mr. Justice Harlan's dissent in Borg-Warner ought to control the disposition of the instant controversy. Despite the merit of that rationale, it cannot be gainsaid that it does not represent the

governing rule of law under which we must decide this case. The trial examiner and the Board properly relied on the Borg-Warner case.

During oral argument the Company contended that the Board's order was too broad in ordering execution of the contract agreed to by both parties, minus the "ballot" clause. The Board responded that this was a new argument that could not be raised before this Court. By a subsequent motion, the Company points to an earlier objection of record which does make reference to the order being too broad. However, the rather general objection and the argument now posed are without merit.

Borg-Warner upheld the authority of the Board to require a party to sign a contract, the terms of which have been agreed to, except for a clause upon which a party has no right to insist. That case supports the authority of the

Board to adopt the recommended order here which requires the Company, at the Union's option, to execute the agreement offered by the Company but omitting the objectionable "ballot" clause.

H. K. Porter Company, Inc. vs. NLRB, _____U.S._____(1970) decides a wholly different issue. Certiorari was there granted to consider whether the Board, in those circumstances, had the power to remedy predetermined unfair labor practices by requiring the Company to agree to check off dues. The Conclusion was that, in that unique situation, the Board could not compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement.

That decision does not impinge on the vitality of the Borg-Warner rule. The Board's authority to require a party to sign a contract, agreed upon except as to nonmandatory bargaining

subjects, may not be equated with an absence of power to affirmatively impose substantive contractual provisions as a remedy to predetermined unfair labor practices. Likewise, the H. K. Porter case does not appear to withdraw the Board's authority to determine whether a section 8(a)(5) violation has occurred by a company's insistence upon including a nonmandatory bargaining subject to a point of impasse.

The motion for transmission to the court of an additional protion of the record is denied and enforcement of the order of the NLRB is hereby granted.

APPENDIX

SUPREME COURT
OF
THE UNITED STATES

CENTRAL MACHINE & TOOL COMPANY, INC.

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NO. 938

Appendix IV -- Judgment of the Circuit Court of Appeals for the Tenth Circuit substantially affirming, dated dated and filed August 7, 1970.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
vs.	)	NO. 543-69
CENTRAL MACHINE & TOOL COMPANY, INC. Respondent.	)	

JUDGMENT

BEFORE: Phillips, Breitenstein and Hill, United States Circuit Judges.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, Central Machine & Tool Company, Inc., its officers, agents, successors, and assigns on August 19, 1968. The Court heard argument of respective counsel on May 22, 1970, and has considered the briefs and transcripts of record filed in this cause. On July 15, 1970, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity herewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Tenth Circuit that the said order of the National Labor Relations Board

in said proceeding be enforced, and that Central Machine & Tool Company, Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

JUDGE, United States Court of Appeals for the Tenth Circuit

DATED: August 7, 1970.

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IN THE SUPREME COURT OF THE

UNITED STATES

NO. _____

CENTRAL MACHINE & TOOL COMPANY, INC.

Petitioner

VERSUS

NATIONAL LABOR RELATIONS BOARD

Respondent.

PETITION FOR A WRIT OF CERTORARI
TO
THE UNITED STATES COURT OF
APPEALS
FOR THE TENTH CIRCUIT

Central Machine & Tool Company, Inc., of Enid, Oklahoma, your Petitioner, prays that a Writ of Certorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit entered in the above and entitled matter (Circuit Court Case No. 543-69), on August 7, 1970.

OPINIONS BELOW

Reference is hereby made to the following opinions and the final Judgment as provided by Rule 23(a):

1. Decision of the Trial Examiner of the NLRB in Case 16-CA-3053, dated May 23, 1968.

2. Decision and Order of the National Labor Relations Board.

3. Opinion of the United States Court of Appeals, dated July 15, 1960, substantially affirming.

4. Judgment of the Circuit Court of Appeals for the Tenth Circuit substantially affirming, dated and filed August 7, 1970.

JURISDICTION

The date of the Judgment sought to be reviewed was entered and filed on August 7, 1970. The jurisdiction of this Court is envoked under the provisions of 28 USCA, Section 1254(1).

QUESTION PRESENTED

1. Whether or not this Petitioner as an employer can be forced by the NLRB to execute a contract with the Union, over its objections, which fails to contain certain provisions upon which this Petitioner insisted, to-wit:

> (1) That before any strike could be called by the Union during the tenure of the contract, and as the fourth step of the grievance procedure, it would first comply with and discharge its responsibilities to all of the members of the bargaining unit which it represents, by fairly presenting to all of such employees the question of whether or not a strike should be called; and that before a strike was determined that more than 50% of all the members in the bargaining unit should authorize such strike, and which provision embraces a very important "condition of employment".

STATEMENT

The Central Machine & Tool Company, Inc. operates a small machine shop in Enid, Oklahoma. In March of 1967, it sustained a devastating fire loss to its shop; and about a day later, an election was held under the auspices of the Regional Director of the NLRB, at which election the International Association of Machinists and Aerospace Workers, AFL-CIO, was selected by a small majority to represent all of the production and maintenance employees in the operation. These totaled about 36 people. Of these personnel in the bargaining unit, only slightly more than 50% were members of the Union, according to the vote.

After the Certification, negotiations with the Union commenced. Many sessions were held, and finally, subject to certain conditions which it

was felt could be agreed upon, a counter proposal was submitted by the employer to the Union.

There was one paragraph in the counter-proposal to which the Union strenuously objected, and on which it refused to further negotiate.

This was a sentence contained in the fourth step of the grievance procedure which provided that before a strike would be called, the proposal for a strike would be fairly submitted to all of the personnel, (and not confined merely to Union members), in the production and maintenance department, whom the Union was certified to represent.

This provision the Union adamantly refused, and thereupon filed the charge against this employer for "refusal to bargain" under Section 8(a)(5) of the National Labor Relations Act.

The Board upheld the position of the Union; and filed a Proceeding before the Circuit Court of

Appeals for the Tenth Circuit to force this employer to sign a contract excluding such provision.

The Court sustained the position of the Union, which results in this proceeding before the Supreme Court of the United States for a Writ of Certorari directing the Circuit Court of Appeals to reverse and rescind its Order, and Judgment, thereby removing the restraint which presently prevents this employer from negotiating a Contract which would protect the rights of its employees in the Bargaining Unit -- (and all of the component personnel of which, under the Act, the Union is required to represent, unrestricted and impartially, without regard to Union affiliation.)

ARGUMENT

The contention of this Petitioner is very simple, very brief, but very important.

To put it succinctly, your Petitioner believes that there is nothing in the National

Labor Relations Act which permits the Board to require an employer to sign a contract which is repugnant to its principles; and which fails to protect the rights of all of the employees in the Bargaining Unit.

Not only does the Act require the successful Union to represent all the employees, but during the hearing, the Union Representative himself emphasized the Union responsibility when Mr. Jim Wagner, the Union Representative, testified (A-408):

> Q. (By Mr. Carter) "What I asked the witness was, if he stated, 'If we can't have arbitration, we want to have the right to strike."
>
> A. "Yes Sir, I made that statement."
>
> Q. "Alright, so we discussed that. Do you remember when I asked who you represented, you said, 'We represent the plant out there, the employees in the plant out there"?
>
> A. "No sir, I said the Bargaining Unit."

Under these circumstances, it is difficult

to divine the mechanitions of the Union, with the concurrence of the Board and the approval of the Circuit Court, when it now attempts to say in substance:

> "But if we want to strike, we are not required to consult the members of the Bargaining Unit, whom we represent. The only people we have to confer with, and obtain approval of, are the members of the Union."

This line of reasoning, of course, is untenable and ridiculous. Perhaps it is a rhetorical question, but nevertheless, a most pertinent one:

> "How can the Board after it has certified the Union to represent all of the employees in the Bargaining Unit, equitably, legally, or successfully contend that Central Machine is bargaining in bad faith, when it insists, that before a strike is called, the Union must obtain the affirmative vote of at least a majority of those employees which the Board has designated the Union to represent?"

The position of the Union becomes even less defensible, in view of the fact that in its extreme effort to reach a contract with the Union, Central

Machine had agreed to include the Union's proposed "Maintenance Of Membership" clause in which it agreed to protect the integrity of Union membership.

In spite of its solemn obligation to represent all of the employees in the Plant, the Union apparently arrogates to itself, the right, only with the consent of slightly more than 1/4th of the employees, (the majority of the Union employees only) to call a strike and picket the plant, not only for a day, but for months, if it sees fit; and deprive all of the remaining 3/4ths of the employees of employment.

It was not this Petitioner, but the Union which refused to bargain on this point.

And yet, "wages, hours, and conditions of employment" constitute mandatory subject of discussion and bargaining.

Should the Court determine by some remote

possibility that the clause insisted upon by the Company was not a "mandatory issue" upon which bargaining must be held, then we must assert that it is an issue upon which bargaining is not precluded by the Act; and the Company was certainly bargaining in good faith when it insisted upon that clause.

It is to be noted, of course, that Counsel for the Board, in its Argument, and the Circuit Court in its Opinion, relied heavily upon the case of:

> "NLRB vs. Wooster Division of Borg-Warner Corporation, 356 U. S. 342, 349, 350 (1958)."

That case was decided by this Court approximately twelve (12) years ago, in a 5 to 4 decision.

Justice Burton delivered a well written opinion, which represented the majority thinking of the Court at that time, while Justice Harlan delivered and issued a extremely cogent and well

developed dissenting opinion which was concurred in by the eminent Justices, Frankfurter, Clark, and Whittaker.

In substance, the minority opinion held that the "ballot" clause did fall within the concept of "mandatory bargaining"; but that even if it were not included, then it was certainly not a clause which was prohibited from inclusion in the Bargaining negotiations; and that the Company should not be penalized by insisting upon its inclusion.

Cases cited in Justice Harlan's opinion were:

"Labor Board vs. National Maritime Union, 175 F2d 686."

"Medo Photo Supply Corporation vs. Labor Board, 321 US 678."

We are not criticizing or attacking the majority opinion written by Justice Burton, based upon conditions as they existed in 1958, because his opinion at that time, we feel was perhaps justified under conditions of Labor Relations as

then prevailed.

We do feel that the majority opinion was substantially tempered and softened by the dissenting opinion prepared by Justice Harlan; and that the close division of the Court, in that 5 to 4 decision, rendered it susceptible to subsequent attack, as the years have passed, and as this Petitioner is urging at this time.

The history of this Court, of course, graphically reveals that the doctrine of "Stare Decisis" is not nearly so sancrosant as it used to be.

And so, during the twelve (12) years which have expired since the "Borg-Warner" decision, there have been many erosions of the rules relating to mandatory and permissive bargaining, enunciated therein.

We feel this is right and proper, because there have been many changes in the application

of Labor Relations Law.

For instance, the Board in Allen Bradley Company vs. NLRB (Circuit Court of Appeals Seventh Circuit, 1961), 286 F2d 442, held that an employer had the right to insist upon a condition which would include in the Contract a provision to limit the right of the Union to discipline its own members for engaging in self-organizational activities, or refraining from such activities. The Court held that since the purpose of the clause was to permit employees to work during the strike, and the proposal related to "terms and conditions of employment" the clause was subject to mandatory bargaining and the Union obliged to bargain in good faith on that clause.

In this case, the Union apparently insists that we are invading their internal rights of determination, which certainly would involve "discipline"; and yet, the Seventh Circuit has held that

this was a proper and legal subject for "mandatory bargaining".

In addition thereto, since 1958, there have been further expansions of the clause "terms and conditions of employment." In many cases, which involve bonuses, insurance, profit-sharing plans, and other items which certainly are important, but not more important than the conditions to be imposed before a strike can be called, the Courts have approved.

As a matter of fact, without the necessity of citing specific cases, it has been held that a "Strike" and a "No-strike" clause are subjects of mandatory bargaining.

A more significant recent case is that decided by this Honorable Court on March 2, 1970, to-wit:

> "H. J. Porter Company, Inc., Petitioner, vs. National Labor Relations Board, Respondent, being case No. 230 of this Court."

This case involved the right of an employer to refuse to include in a Contract a "check-off" clause.

Justice Black delivered the opinion of this Court, Justice White and Justice Marshall did not participate in the consideration or decision of the case. Justice Harlan concurred. Justice Douglas and Justice Stuart dissented.

The opinion of Justice Black and the concurring Justices is exhaustive and cogent. It recites the legislative history of the Labor Relations Act.

The majority opinion cites numerous cases sustaining its decision; but particularly relies upon that provision in Section 8(b) which requires collective bargaining between the parties, but further contains the very definite provision with reference to the obligation to negotiate as follows:

> "But such obligation does not compel either party to agree to a proposal or require the making of a concession."

Justice Black, with the concurrence of a majority of this Court, further stated:

> "One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, nevertheless allowing the Board to compel agreement when the parties themselves are unable to do so, would violate the fundamental premise on which the Act is based -- private bargaining under Governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract."

Another cogent statement contained in the majority opinion appears as follows:

> "It may well be true, as the Court of Appeals felt, that the present remedial powers of the Board are insufficiently broad to cope with important labor problems. But it is the job of Congress, and not the Board or other Courts, to decide when and if it is necessary to allow Governmental review of proposals for collective bargaining agreements, and compulsory submission to one side's demands. The present Act does not envision such a process." (Underlining ours).

If a "check-off" is a proper subject of negotiation, under the "terms and conditions of employment" requirement, then it appears to us that certainly a clause relating to the appropriate method of calling a strike, which will certainly affect the "conditions of employment" of all of the employees would fall under that mandatory category. Certainly, it is not precluded.

Professor Harry H. Wellington, professor of Labor Law at Yale University, in his recent publication, "Labor and the Legal Process", stated in connection with the Borg-Warner case as reported in the American Bar Journal (February issue, 1970), page 169:

> "What should collective bargaining cover? The author says that any subject arguably within the statutory language 'wages, hours, and other terms and conditions of employment' should be a mandatory subject for collective bargaining if proposed in good faith, with an exception to protect an employer who is only a third party to the union's objective. He finds the Supreme Court's Borg-Warner rule too restrictive."

More recently and on April 3, 1970, in a session of the Labor Relations Institute conducted at Atlanta, Georgia and sponsored by the Atlanta Lawyers Foundation, Inc., and the Federal Bar Association, John L. Waddleton, Chief Counsel for the Allis-Chalmers Manufacturing Company, in a very erudite lecture posed the very pertinent question involving this very same issue:

> "By what logic, can non-members be precluded from expressing their views?"

He was referring to matters such as this which affected the entire Bargaining Unit and he had specific reference to the Borg-Warner case.

He was complaining of the very same situation about which we are concerned here. The non-members of the Union in the Bargaining Unit have the very same interest involved. They are concerned about their "wages, hours, and conditions of employment". But under a strict interpretation of

the Borg-Warner rule, in the event a strike is suggested, they would have no right to express their views. This is unconscionable.

It is obvious therefore, that the Borg-Warner decision must be reviewed in the light of economic and legal developments during the past twelve years; and in view of the very close 5 to 4 decision, the admonitions and suggestions of Mr. Justice Harlan must be given more and more consideration.

We believe the time is ripe now to re-examine, re-analyze, and review the Borg-Warner decision in the light of present conditions; and we particularly commend the instant case as appropriate for that purpose.

Many years before there was a "Wagner Act" or a "Taft-Hartley Act" or any other Federal act relating to labor, our revered Thomas Jefferson in his Inaugural Address recognized the possibility and even

the probability that there were certain inherent dangers in a strict "Rule of Majority", when he stated in his First Inaugural Address as President of the United States, words to the effect that:

> "A majority can not be permitted to become a tyrant."

That is exactly what the Union is endeavoring to do, and the Board is supporting; that since the Union does have a slight majority in the plant at Central Machine and Tool Company, they can by fiat, control the decision and the time of a strike which would seriously and adversely affect all of the workers in the plant regardless of the wishes, reasons, or desires of the minority.

One of the most vicious aspects of this posture on the part of the Union is that it is not even required to provide the non-union members with the opportunity to state their objections to a strike. They are not even required to consult with the non-union members.

As this Court well knows, it is now deemed a matter of extreme judicial concern that before any decisive action to be taken by any group, society, association, or even a person, without giving the persons who may be adversely affected thereby, a full opportunity to be heard, not only is reprenhensible but in many instances, unlawful.

This Petitioner respectfully submits that all of its employees in the Bargaining Unit have a right to be heard and a right to vote on a proposed strike.

For these reasons, it is respectfully urged that this Petition be granted.

Respectfully submitted,

CENTRAL MACHINE & TOOL COMPANY, INC. OF ENID, OKLAHOMA

By: Frank Carter
FRANK CARTER, ITS ATTORNEY

Dated in Enid, Oklahoma this 3rd day of November, 1970.

Of Counsel:
Otjen & Carter
Bass Building
Enid, Oklahoma

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 938

CENTRAL MACHINE & TOOL COMPANY, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board found that petitioner wrongfully discharged an employee because of his union activities, and unlawfully refused to bargain with the union by negotiating in bad faith, failing and refusing to meet at reasonable times, unilaterally granting wage increases, unilaterally withdrawing a quarterly bonus, and refusing the union's request for information regarding the unilateral wage increases (R. 1055, 1075,

1077-1078).[1] The court of appeals sustained these findings (Pet. App. III, 3-5), and petitioner does not challenge them here. The Board also found that petitioner refused to bargain, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by conditioning agreement with the union upon a contract clause which required the union, before striking, to present the issue to the membership of the bargaining unit, and to obtain the approval of more than 50 per cent of the members of the unit. The Board found the situation identical to that in *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, where the Court held that insistence on a similar "ballot" clause was unlawful. Such a clause falls outside the area of mandatory bargaining under the Act because it "settles no term or condition of employment." 356 U.S. at 350. Agreeing that *Borg-Warner* controlled, the court of appeals sustained the Board's finding with respect to the ballot clause (Pet. App. III, 6-9).

2. The sole question presented by the petition is whether this Court should reconsider and reverse its holding in *Borg-Warner*, adopting instead the dissenting view, 356 U.S. at 351, that insistence on a ballot clause is not unlawful under the Act. The petition should be denied, for, contrary to petitioner's suggestion, nothing has occurred in the 12 years since *Borg-Warner* that warrants reexamination of that decision.

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[1] "R." references are to the appendix to the briefs in the court below.

The courts of appeals have uniformly applied the principle of *Borg-Warner* and have experienced no problem in doing so.[2] *H. K. Porter Co.* v. *National Labor Relations Board*, 397 U.S. 99, does not impair the rationale of *Borg-Warner*. As the court below properly recognized (Pet. App. III, 8-9), *Porter* merely holds that the Board lacks power to compel the employer to accept a contract provision covering a mandatory bargaining subject—there the checkoff of union dues[3]—where the parties had not reached

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[2] See, *e.g.*, *Marine & Shipbuilding Workers* v. *National Labor Relations Board*, 320 F. 2d 615 (C.A. 3), certiorari denied, 375 U.S. 984; *National Labor Relations Board* v. *Bricklayers & Masons Int'l, Local No. 3*, 405 F. 2d 469 (C.A. 9); *Oil Chemical & Atomic Workers* v. *National Labor Relations Board*, 405 F. 2d 1111, 1117 n. 18 (C.A.D.C.) (citing many cases).

In *Allen-Bradley Co.* v. *National Labor Relations Board*, 286 F. 2d 442, 445 (C.A. 7), on which petitioner relies (Pet. 13), the court expressly distinguished the clause there involved—a provision limiting the union's right to discipline or fine its members—on the ground that it "is more akin to the 'no-strike' clause which the Court in *Borg-Warner* recognized as concerned with 'relations between the employer and the employees' and therefore, a proper matter for collective bargaining." Moreover, the Seventh Circuit has since cast doubt on the continued vitality of *Allen-Bradley*. See *Scofield* v. *National Labor Relations Board*, 383 F. 2d 49, 54 (C.A. 7), affirmed, 394 U.S. 423.

[3] Prior to *Borg-Warner*, the checkoff had been held to be within the area of "terms and conditions of employment." See *U.S. Gypsum Co.*, 94 NLRB 112, 113, n. 7 (1951); *Reed & Prince Mfg. Co.*, 96 NLRB 850, 857 (1951), enforced, 205 F. 2d 131, 136 (C.A. 1), certiorari denied, 346 U.S. 887. Thus, the fact that the Court in *Porter* assumed the checkoff to be a proper subject of negotiations is not evidence of "erosions of the rules relating to mandatory and permissive bargaining * * *." (Pet. 12).

agreement on that subject in their negotiations. Nothing in *Porter* suggests that the employer is free to condition a contract on a subject outside the area of mandatory bargaining, such as the ballot clause here, or that the Board cannot, as a remedy for that unlawful insistence, order the employer to execute the contract which has otherwise been agreed to, omitting the ballot clause.[4] See *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

DECEMBER 1970.

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[4] The Board ordered petitioner, at the union's option, to execute the agreement offered by it to the union omitting the ballot clause (Pet. App. I, 15).

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